

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of EUGENE VAN DYK and AGENCY FOR INTERNATIONAL
DEVELOPMENT, Tegucigalpa, Honduras

*Docket No. 02-126; Submitted on the Record;
Issued July 26, 2002*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs abused its discretion in refusing to reopen appellant's claim for further review of the merits of his claim under 5 U.S.C. § 8128(a).

The Board has duly reviewed the case record in this appeal and finds that the Office did not abuse its discretion in refusing to reopen appellant's claim for merit review.

The Office accepted that on October 21, 1989 appellant, then a 43-year-old auditor, sustained multiple third degree burns, fracture of the left radius, fracture of the right medial malleolus, aggravation of right knee arthritis and an inhalation injury when he was involved in a airplane crash while in the performance of duty.

On September 22, 1998 appellant filed a claim for a schedule award. In support of his claim, appellant submitted an August 30, 1998 report from Dr. Marion H. Jordan, his treating Board-certified surgeon, who opined that, pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, appellant had a 35 percent impairment of his right upper extremity, a 12 percent impairment of his left upper extremity, a 25 percent impairment of the whole person due to his pulmonary condition and a 55 percent impairment of the whole person due to his skin injuries.

On May 27, 1999 the Office referred appellant, together with a statement of accepted facts, a list of questions to be answered and copies of the relevant evidence of record, to Dr. Thomas R. Dorsey, a Board-certified orthopedic surgeon, for a second opinion evaluation. Following the receipt of Dr. Dorsey's June 15, 1999 report, the Office forwarded the report to Dr. Leonard A. Simpson, an orthopedic surgeon and Office medical adviser, for application of the appropriate portions of the A.M.A., *Guides* to Dr. Dorsey's findings on examination.

In a report dated September 5, 1999, the Office medical adviser opined that appellant had a 42 percent permanent impairment of his right upper extremity, a 16 percent permanent

impairment of his left upper extremity and a 15 percent permanent impairment of his right lower extremity due to these accepted conditions.

By decision dated September 14, 1999, the Office granted appellant a schedule award reflecting a 42 percent permanent impairment of his right upper extremity, a 16 percent permanent impairment of his left upper extremity and a 15 percent permanent impairment of his right lower extremity. He requested an oral hearing before an Office representative, which was held on March 2, 2000. Appellant specifically asserted that the prior schedule award failed to take into account his pulmonary impairment due to his inhalation injury and his disfigurement and loss of normal skin function due to his extensive scarring.

In a decision dated May 26, 2000, the hearing representative affirmed the Office's schedule award for the impairments to appellant's upper and lower extremities, but remanded the claim for further development of the issue of whether appellant has any additional impairment due to loss of pulmonary function. The hearing representative further found that appellant had not submitted any medical evidence in support of his claim for a loss of skin function. Finally, the hearing representative noted appellant's arguments with respect to his claim for a schedule award for disfigurement, but did not further discuss this issue.

By letter dated May 16, 2001, appellant requested reconsideration of the Office's decision and submitted documentary evidence in support of his request. In a decision dated July 18, 2001, the Office denied appellant's request for reconsideration on the grounds that his request neither raised substantive legal questions nor included new and relevant evidence and, therefore, was insufficient to warrant review of its prior decision.

The Board finds that, with respect to the Office's July 18, 2001 decision denying reconsideration of the Office's May 26, 2000 decision, the Office properly exercised its discretion in refusing to reopen appellant's case for merit review under 20 C.F.R. § 10.608.

Section 10.606(b)(2) of Title 20 of the Code of Federal Regulations provides that a claimant may obtain review of the merits of the claim by either: (1) showing that the Office erroneously applied or interpreted a specific point of law; (2) advancing a relevant legal argument not previously considered by the Office; or (3) submitting relevant and pertinent new evidence not previously considered by the Office.¹ Section 10.608(b) provides that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), the Office will deny the application for reconsideration without reopening the case for a review on the merits.²

In his letter requesting reconsideration, appellant asserted that the Office failed to properly calculate his schedule awards, as they failed to consider any additional impairments he might have as a result of loss of normal skin function, disfigurement and pulmonary impairment. The Board initially notes that the issues of whether appellant is entitled to additional awards for disfigurement and pulmonary impairment are in an interlocutory posture, as the record reflects

¹ 20 C.F.R. § 10.606(b)(2) (1999).

² 20 C.F.R. § 10.608(b) (1999).

that these issues are still under development by the Office and no final decision has yet been issued.³ As the Office has yet to issue its final decisions with respect to these issues, the Board has no jurisdiction to consider these issues on appeal.⁴

The Board further finds that the Office properly declined to reopen appellant's claim for reconsideration of his claim for a schedule award for loss of normal skin function. The schedule award provision of the Federal Employees' Compensation Act⁵ and its implementing regulation⁶ set forth the number of weeks of compensation to be paid for permanent loss or loss of use of the members of the body listed in the schedule. No schedule award is payable for a member, function or organ of the body not specified in the Act or in the implementing regulations.⁷ The Act itself specifies the following members: arm, leg, hand, foot, thumb and finger. The Act also specifies loss of hearing and loss of vision and provides compensation for the loss of an eye. The Act specifies serious disfigurement of the face, head or neck but it does not specify the skin.⁸

Section 8107(c)(22) of the Act provides for payment of compensation for permanent loss or loss of use of "any other important external or internal organ of the body as determined by the Secretary of Labor."⁹ The Secretary of Labor has made such determinations and pursuant to section 8107(c)(22) of the Act has added the following organs to the compensation schedule: breast, kidney, larynx, lung, penis, testicle, tongue, ovary, uterus/cervix and vulva/vagina.¹⁰ The Secretary has made no provision in the implementing regulations for the skin.

As neither the Act nor the regulations provide for the payment of a schedule award for a skin disorder, no claimant is entitled to such an award. Therefore, appellant's arguments

³ On September 26, 2000, at the request of the Office, appellant underwent a second opinion examination by Dr. Sammy T. Hung, a Board-certified internist specializing in pulmonary disease, in order to determine whether he has any permanent pulmonary impairment as a result of his employment injury. In addition, the record contains a September 10, 2001 letter, from the Office to appellant, stating that the case record was currently being copied and that, upon its return from the copying department, appellant's claims for additional schedule awards for pulmonary impairment and disfigurement would be evaluated.

⁴ The Board's jurisdiction to consider and decide appeals from final decisions of the Office extends only to those final decisions issued within one year prior to the filing of the appeal. *Algimantas Bumelis*, 48 ECAB 679 (1997); *Jimmy L. Day*, 48 ECAB 654 (1997).

⁵ 5 U.S.C. §§ 8101-8193; *see* 5 U.S.C. § 8107(c).

⁶ 20 C.F.R. § 10.304.

⁷ *William Edwin Muir*, 27 ECAB 579 (1976) (this principle applies equally to body members that are not enumerated in the schedule provision as it read before the 1974 amendment and to organs that are not enumerated in the regulations promulgated pursuant to the 1974 amendment); *see also* *Ted W. Dietderich*, 40 ECAB 963 (1989); *Thomas E. Stubbs*, 40 ECAB 647 (1989); *Thomas E. Montgomery*, 28 ECAB 294 (1977).

⁸ *See* 5 U.S.C. § 8107(c)(21). Appellant has not alleged serious disfigurement of the face, head or neck likely to handicap him in securing or maintaining employment.

⁹ 5 U.S.C. § 8107(c)(22).

¹⁰ 20 C.F.R. § 10.404(a)

pertaining to his entitlement to a schedule award for loss of normal skin function do not have a reasonable color of validity and the Office properly employed its discretion in refusing to reopen the case for further review on the merits.¹¹ Therefore, appellant's May 16, 2001 request for reconsideration neither alleged nor demonstrated that the Office erroneously applied or interpreted a specific point of law, nor advanced a relevant legal argument not previously considered by the Office. Consequently, appellant is not entitled to a review of the merits of his claim based on the first and second above-noted requirements under section 10.606(b)(2). Finally, while appellant did submit additional documentary evidence in support of his claim, this evidence consisted solely of excerpts from the A.M.A., *Guides* and articles pertaining to the skin and its functions. The Board has held on several occasions that the reopening of a case for reconsideration requires the submission of evidence of a substantive or probative nature. Newspaper clippings, medical texts and excerpts of publications are of no evidentiary value in establishing a claim as they are of general application and are not probative as to whether specific conditions were the result of particular circumstances of the employment.¹² The Board finds that the evidence submitted by appellant falls in the same class as newspaper clippings, medical texts and excerpts of publications. Consequently, appellant is not entitled to a review of the merits of his claim based on the third above-noted requirement under section 10.606(b)(2).

Inasmuch as appellant has failed to show that the Office erroneously applied or interpreted a point of law, to advance a relevant legal argument not previously considered by the Office or to submit relevant and pertinent evidence not previously considered by the Office, the Office properly refused to reopen appellant's claim for a review on the merits.

¹¹ See *John F. Critz*, 44 ECAB 788 (1993); *Jimmy O. Gilmore*, 37 ECAB 257, 262 (1985).

¹² *Alan L. Buchholz*, 33 ECAB 271 (1981).

The July 18, 2001 decision of the Office of Workers' Compensation Programs denying appellant's request for reconsideration is hereby affirmed.¹³

Dated, Washington, DC
July 26, 2002

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

¹³ The Board notes that the record contains a second decision of the Office also dated July 18, 2001, in which the Office found that appellant was not without fault in the creation of an overpayment in the amount of \$273,317.23. However, in his letter of appeal to the Board, appellant specifically stated that he was appealing the Office's July 18, 2001 decision denying his request for reconsideration of the May 26, 2000 decision by the Branch of Hearings and Review. Therefore, the Board has not reviewed the Office's July 18, 2001 overpayment decision.